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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1950. No.

ELIZABETH HEALY, Administratrix of the Estate of JOHN E. HEALY, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Elizabeth Healy, Administratrix of the Estate of John E. Healy, deceased, and the above named petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit, rendered and entered in this cause on September 11, 1950.

DECISION AND JUDGMENT OF THE COURT BELOW.

The opinion of the Court below, as amended on October 10, 1950, is reported in 184 F. 2d 209 (C. A. 3, 1950). The opinion appears on page 181 of the Record filed herewith.

NATURE OF CASE AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a death action under the Federal Employers' Liability Act (Title 45 U. S. C. A., Sec. 51, et seq.) brought by the petitioner here, the widow and administratrix of an employee of the defendant. The death of plaintiff's husband occurred on December 4, 1944, while he was in the employ of the defendant, Pennsylvania Railroad Company, when he was struck and killed by an engine of the defendant at Cresson, Pennsylvania. *Defendant's answer admitted that decedent was fatally injured at Cresson.*

Defendant presented no evidence in the case. The plaintiff's testimony was obtained almost exclusively from the mouths of defendant's employees, some of whom were obviously hostile at least in the sense of being the very persons charged with negligence, and whose testimony therefore was presented as on cross-examination (R. 25-32).

The main facts were not disputed at the trial, and the controversy was principally as to the inferences to be drawn from proved facts.

On December 4, 1944, decedent, along with a group of fellow employees, was instructed by his foreman to report to the town of Gallitzin, there to be picked up by the defen-

dant's truck and be taken to a war bond rally to be held in Cresson, Pennsylvania (R. 41). The foreman had given these instructions pursuant to directions from his supervisor. The rally was to take place during company time, and employees were to be paid for all time spent in going to and attending the rally (R. 61).

Decedent had previously subscribed for bonds through defendant's payroll deduction plan. One such bond, though paid for, had not been delivered and was overdue (R. 11, 56, 63). Under the practice of the defendant, complaints for non-delivery could be registered with the foreman or with the supervisor at Cresson, to whom in any event the foreman would go on receiving complaints from the employee (R. 49, 50).

On the morning of the rally, decedent told both his wife and a track foreman of the defendant that he was concerned about the undelivered bond, and that he planned to inquire about it (R. 11, 56, 63).

On arrival at Cresson, decedent and his fellow employees found the doors of the rally hall still closed (R. 54). Shortly after said arrival, possibly five or ten minutes, word reached the men in the hall, by this time opened, that decedent had been struck and killed at Cresson Station (R. 56), a short distance away from the rally hall, and on the route which would take decedent from the hall to the supervisor's office on the other side of the tracks (R. 60).

Decedent was struck by a train of some seventy cars moving eastwardly (R. 13), at a speed of about five to eight miles per hour (R. 15). The power was shut off, and the train was just "floating along" (R. 14) and therefore moving relatively quietly (R. 15) as it approached the point at which decedent was struck, at or near a baggage cross-walk (R. 70) which was frequently used by defendant's employees in crossing the tracks (R. 15, 19, 57).

Although he had worked on this division for some seven or eight months and necessarily passed this wooden baggage-way or cross-way once or twice every two weeks, the

fireman had not familiarized himself with or been told of the existence of this cross-way (R. 81). The engineer, who had been working along this route almost seven years (R. 19), admitted he knew of the existence of the baggage cross-walk and of the fact that it was used by employees of the company (R. 19), but apparently did not instruct the fireman about it (82a).

The accident occurred about eight o'clock on a foggy morning, but there was visibility for about fifteen car lengths (R. 155).

Admittedly, the engineer, on approaching the station cross-way, saw a man dressed in a yellow or brown coat (R. 15) (the uncontroverted evidence is that the decedent was wearing a tan coat) (R. 12) going from south to north (R. 16) (apparently en route to the supervisor's office) (R. 15).

Despite (1) the engineer's knowledge of the cross-over, (2) his knowledge that it was used by employees, (3) his knowledge that a man was in fact going over this very cross-over, (4) his knowledge that the train was "gliding" without power, and therefore moving relatively quietly or noiselessly (R. 15), and (5) the fact that the sounding of the whistle is required by Rule 14 (p) of the Railroad (R. 126), the engineer not only failed to blow the whistle (R. 154, 25, 26, 35), but he failed to say anything to his fireman about the cross-over or about the man who was then crossing (R. 20) ahead of them.

The fireman did not look out of his cab until after the decedent had been actually hit and was rolling in the six-foot (R. 70). Nor apparently did the engineer continue to look in the direction of the crossing after he there saw the man in the tan coat. As the opinion of the Court of Appeals indicates, a "hiatus" then occurred. Since neither the engineer nor the fireman thereafter looked toward the cross-over, neither saw anyone at the cross-over until after the decedent's body had been hit and was rolling in the right of way. At that point, the fireman told the engineer to "hold it", and informed him that they had run over

"somebody—a man" (R. 19, 73). The engineer did not throw on his emergency brake, but instead gave the brakes an ordinary "service" application. As a result, the train continued five car lengths before coming to a stop (R. 19). The "emergency" application would have stopped the train in one and a half car lengths (R. 123).

Under the rules of the company, both the engineer and the fireman were required to maintain a constant look-out ahead under the circumstances (R. 21), and to apprise one another of what each saw (R. 21, 127, 128). At the time of the accident, one looking out of the cab of the engine, on approaching the cross-way, would have clear visibility for about fifteen hundred feet (R. 83).

Under these facts, the jury returned a verdict in favor of the plaintiff widow in the sum of $15,170.60. Defendant's motion for directed verdict and for a new trial were denied by the Trial Court. The Court of Appeals then held that the evidence was sufficient to show that it was probable that the decedent was crossing the tracks to inquire about his bond; that the question of whether Healy was within the scope of his employment had been properly left to the jury, and that the decedent's trip to inquire about the bond was not beyond the scope of his employment. But the Court of Appeals reversed judgment on the reasoning that "the only conceivable negligence on the part of the Railroad lies in the fact, for we must assume it to be a fact, that the engineer did not sound his whistle as he reached the station as required by Rule 14(p)", and that there is "nothing to demonstrate a causal connection" between the failure to sound the whistle and the happening of the accident, beyond speculation. This petition for certiorari follows.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered September 11, 1950. The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 56) and the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., Sec. 1254).

QUESTIONS PRESENTED.

1. Did not the Court of Appeals (Third Circuit) err in reversing judgment, entered on a verdict for the plaintiff, on the sole ground that no causal connection had been "demonstrated" between what the Court conceded to be the "negligence" of defendant's engineer in failing to sound a warning whistle, and the death of plaintiff's decedent, where the Court overlooked, failed to consider, or even to mention a number of other glaring items of substantial negligence as to which there could be no question of causation, and instead treated the defendant's failure to sound the whistle as "the only conceivable negligence"?

2. Even if failure to sound the whistle was the only negligence of the defendant's employees, as suggested by the Court of Appeals, did not the Court err in holding as a matter of law that such negligence was not a cause in whole or in part of the death, despite the jury's verdict to the contrary after the charge by the Trial Court had left the question of causation to the jury?

3. Does not the decision of the Court of Appeals deny to the plaintiff a right to a jury trial on the questions of negligence and causation as guaranteed by the Federal Employers' Liability Act, the Constitution of the United States, and repeated decisions of this Court?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The record in this case is replete with evidence, much of it coming from the mouths of culpable agents of the defendant, of glaring elements of negligence which the Court of Appeals apparently entirely failed to note, as to which there could be no problem of causation, or at least as to which a clear jury issue was presented. These elements of negligence are so glaring that the failure of the Court of Appeals even to refer to them is suggestive of clear oversight on the part of the Court in reading the record and would result in a serious miscarriage of justice, unless a Writ of Certiorari is granted.

2. Even assuming that the only negligence on the part of the defendant was the failure to sound the whistle, the Court of Appeals was guilty of patent error of law (1) in holding that no causation had been made out merely because causal connection had not been "demonstrated" with physical absoluteness, (2) in rejecting the implicit finding of the jury on the issue of causation by treating the issue of causation as one of law rather than fact.

3. The opinion of the Court of Appeals is obviously in conflict with decisions of this Court, with respect to plaintiff's right to a jury determination of issues of causation,

and clearly warrants granting of this Petition for Certiorari and reversal of the judgment of the Court of Appeals. See, e. g.,

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944);

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946);

Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949);

Penn v. Chi. and N. W. Ry. Co., 335 U. S. 849, 69 S. Ct. 79 (1948).

4. The opinion of the Court of Appeals is clearly in conflict with decisions in other Circuits with respect to the plaintiff's right to a jury determination of the issue of causation. See, e. g.,

Casey v. American Export Lines, 173 F. 2d 324 (C. A. 2, 1949);

Eglsaer v. Scandrett, 151 F. 2d 562 (C. C. A. 7, 1945);

Kurimsky, Admx. v. Unity Rys. Co., 357 Pa. 521 (1949).

PRAYER.

Petitioner prays that a Writ of Certiorari be granted by this Honorable Court directed to the Court of Appeals for the Third Circuit to the end that the record in this case be reviewed by this Court, and that upon such review the judgment of the Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In this case the Court of Appeals for the Third Circuit has reversed a judgment entered by the Trial Court on a jury verdict in a death action brought under Federal Employers' Liability Act. In so reversing judgment, the Court of Appeals concluded that there was negligence on the part of the railroad in failing to sound a warning whistle to apprise decedent of the approach of the train which struck him. But the Court described the omission to sound the whistle as "the only conceivable negligence on the part of the railroad."

The sole prop for the holding of the Court of Appeals in favor of the defendant is epitomized in the following one sentence of the opinion:

> "There is nothing to demonstrate a causal connection between the failure of the engineer to sound the whistle and the happening of the accident or that that failure contributed 'in whole or in part' to Healy's death."

It is respectfully submitted that the opinion of the Court of Appeals made two flagrant errors. The first was a patent error of fact as to the nature and extent of the defendant's negligence; the second was an error of law in assuming that causation must necessarily be "demonstrated" with mathematical or absolute certainty. Each of these errors will be discussed seriatim.

A. The Court of Appeals erred in assuming that the only negligence was the failure to sound a whistle.

The assumption, without question or discussion (by the Court of Appeals) that the only evidence of negligence was

the failure to sound a whistle is so easily refuted even by a casual examination of the record as to suggest plain oversight by that Court in reading the record. It is not as though the Court had considered other alleged elements of negligence, and rejected evidence thereon as insufficient. The opinion simply fails to advert *at all* to a whole series of cumulative circumstances, besides the failure to blow the whistle, all of which not only easily support a finding of negligence, but also a finding of causation. In other words, assuming, pro arguendo, that causation is lacking so far as the failure to blow the whistle is concerned, there can be no question about the existence of causation with respect to these other items of negligence. Needless to say, the rejection of a jury verdict based on "quantum of evidence" merely because of an Appellate Court's inadvertent failure to note the full contents of a record, should not be sustained where the consequence would be a clear miscarriage of justice.

The evidence is clear that defendant's engineer knew (R. 19) and it was a notorious fact that there was a cross-way over which employees of the defendant habitually walked (R. 15, 19, 57). This fact alone imposed an obligation upon the defendant to anticipate employees on foot at the crossing and to maintain a lookout for them when trains approached. This duty arises even with respect to *trespassers* who are known to use a path or cross-way, and, a fortiori, where the pedestrian is an employee of the railroad. See Restat. Torts, Secs. 335 and 336, especially Illustration 1 under Sec. 336.

Yet here the fireman on the engine which struck the decedent, although having worked in this area for seven or eight months, did not know of the cross-way, was never apprised thereof (R. 81), and therefore, admittedly kept no lookout as the train approached the point of impact (R. 70). Apparently the decedent was struck by the far or fireman's side of the engine (R. 17). Since the track was straight, and the visibility clear and adequate, is it not self-evident

that the failure of the fireman to look out under these circumstances justified a finding by the jury of negligence having a *substantial* causal effect? Certainly the jury was entitled to conclude that the accident was the result, in whole or in part, either of the railroad's placing an unqualified or incompetent fireman on this train because he was unacquainted with this territory, or the result, in whole or in part, of the fireman's failure to maintain a lookout for employees whose presence he was under a duty to anticipate.

The engineer admittedly knew of the existence of the cross-way (R. 19), yet he apparently failed to keep a lookout, even after being put on notice of the possible presence of pedestrians, when he admittedly saw a man in a yellow or brown coat at the crossing (R. 15). Visibility was clear for fifteen car lengths (R. 155). As has often been declared judiciously, one will not be heard to say that he looked, if he failed to see what must have been directly before him.

> *B. & O. R. R. Co. v. Muldoon*, 102 F. 2d 151 (C. C. A. 3, 1939).

Admittedly, both the engineer and the fireman were required by company rules to maintain a constant lookout, apart from any knowledge of this cross-way (R. 21). Apparently neither maintained a lookout.

But that is not all. Here there was not only constructive notice that employees might be present at or near the cross-way—there was actual knowledge on the part of the engineer of the presence of a human being on the cross-way. Nevertheless, admittedly, the engineer said nothing to the fireman that he had seen a man dressed as was the decedent at the crossing (R. 20). The engineer was silent, although admittedly both the fireman and the engineer are required under company rules to apprise and check with the other as to what each sees (R. 21, 127, 128). Can there be the slightest doubt that, apart from the fireman's failure to keep a lookout, (a) the engineer's failure to keep a lookout, and (b) the engineer's failure to warn the fireman of the

existence of the cross-way and of the man in the tan coat, as well as (c) the railroad's failure to make sure that its crew knew that this cross-way was habitually so used, constituted elements of negligence, individually and cumulatively, establishing substantial and sufficient evidence to sustain a jury's finding of negligence and causation?

Knowledge on the part of the fireman and engineer that the train was gliding without power and that therefore it was moving relatively quietly or noiselessly, accentuated the need for due care (whistle) upon approaching a known cross-way. The degree of care is commensurate and increases with the seriousness of the risk to be perceived.

> *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444, 451 (1943);
> *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 353, 63 S. Ct. 1062 (1943);
> *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, 604, 65 S. Ct. 545, 547 (1945).

Does not the fact, in the instant case, that a man dressed identically like the decedent, *was seen* heading over the cross-walk, render a jury issue even more compelling than in *Tiller v. Atlantic Coast Line R. Co.* (supra), where the Court held that a jury issue arose despite lack of specific knowledge that any particular person was in the ambit of danger, and mere general knowledge that employees *might* be there, was held sufficient to create a duty of anticipation and warning?

But there was still more. After seeing the body of plaintiff's decedent rolling, the fireman told the engineer to "hold it", because they had run over somebody, a man (R. 19, 73). Admittedly the engineer did not throw on his emergency brake but instead gave the brakes an ordinary "service" application (R. 19). As a result, the train continued to move five car lengths before coming to a stop (R. 21, 154). An "emergency" application would have stopped the train in one and one-half car lengths (R. 123). Cer-

tainly a jury could justifiably conclude that had the brakes been applied properly, at least the injuries might have been minimized.

Not one word appears in the opinion of the Court of Appeals with respect to any of these phases of negligence, all of which, in substance, were disclosed by the culpable wrongdoers themselves.

Each of these items of negligence alone was ample to sustain a jury issue both as to negligence and causation. Viewed in the aggregate or collectively, there can be no possible doubt of the sufficiency of the evidence for a jury issue. As this Court said in *Blair v. B. & O. R. R. Co.* (supra):

> "The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pac. R. Co. v. Hadley,* 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other."

It seems inconceivable that the Court of Appeals would not at least advert to this cumulative evidence except upon the hypothesis that it failed completely to review or remember the record. In any event, the jury was justified in predicating its verdict upon these phases of negligence as well as upon the failure of the defendant to sound the whistle, and the sufficiency of the evidence to support a finding of causation with respect to these other phases of negligence seems clear beyond peradventure.

B. The Court of Appeals erred in holding as a matter of law that the failure to blow the whistle was not a cause of the accident.

Ignoring the various elements of negligence just discussed and assuming, pro arguendo, that the only negligence of

the defendant lay in the engineer's failure to sound the whistle after observing the decedent (the man in the tan coat) while walking over the cross-way, it is submitted that the Court erred in holding as a matter of law that the failure to blow the whistle was not the cause of the accident. *The Court in effect required plaintiff to "demonstrate" that the accident would not have happened "but for" the failure to blow the whistle.*

But in dealing with negligence which takes the form of an omission, such as a failure to blow a whistle, or a failure to maintain proper lighting, "demonstration" of a "but for" causal relation to physical absoluteness or certainty is impossible. As Professor Prosser has pointed out in his admirable treatise on Torts (at page 325):

> "The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedents and inevitable consequences, can be nothing more than 'the projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed those sequences on previous occasions'. If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.
>
> "Thus it is common experience that unlighted stairs create a danger that someone will fall. Such a condition 'greatly multiplies the chances of accident, and is of a character naturally leading to its occurrence'. When a fat woman in a hurry tumbles down the steps, it is a reasonable conclusion that the bad lighting has played a substantial part in the fall. Such inferences, in doubtful cases, are of course for the jury." (Citing ***Reynolds v. Texas & Pac. R. Co.***, 37 La. Ann. 694, 1885,

which is the basis for Illustration 3 under Rest., Torts, Sec. 432.)"

In this case, the engineer having been guilty of negligence in failing to sound his whistle, it is impossible to demonstrate mathematically that *but for* such failure the accident would not have happened. But the jury here was certainly as much entitled to decide that sounding of the whistle would have apprised the man in the tan coat of the noiseless approach of the engine, as the jury was in *Reynolds v. Texas & Pac. R. Co.* (supra), to determine that the absence of light was a contributing factor to the accident.

In *Kirincich v. Standard Dredging Company,* 112 F. 2d 163 (C. C. A. 3, 1940), decedent, a deck hand, fell off a barge in tidewater. Fellow deck hands immediately cast ropes or heaving lines one inch in diameter in his direction, three times. One line came within two feet of the spot where decedent was struggling in the water, but because he was unable to swim, he was unable to grasp the line. An action for his death was brought on the sole theory that available life preservers which were buoyant, rather than the one-inch ropes which sank, should have been thrown in his direction. It was argued by the defendant that if he could not swim two feet to catch a rope, he could not have swum two feet to catch the life preserver and that, therefore, causation had not been shown. But the Court held (relying upon *Zinnel v. U. S. Shipping Board Emergency Fleet,* 10 F. 2d 47 (C. C. A. 2, 1925)) that causation had been made out, even though "nobody could in the nature of things, *be sure*" that the use of life preservers would definitely have averted the accident. Compare to the same effect, *DiNicola v. P. R. R.,* 158 F. 2d 856 (C. C. A. 2, 1946).

This Court, having laid to rest, once and for all, the argument that a plaintiff is required to eliminate every possible cause of the injury other than the one which indicates negligence on the part of the carrier (see *Lavender v. Kurn* (supra); *Myers v. Reading Co.,* 331 U. S. 477, 67 S. Ct. 1334

(1947)), now finds itself faced with the reincarnation of a doctrine rejected and discredited in ordinary tort cases long before the advent of the Federal Employers' Liability Act. Lest serious inroads be made into the full right to trial by jury in F. E. L. A. cases, this Court should re-inter this vicious doctrine which holds that a mechanical demonstration of causation is necessary for recovery.

A certain amount of speculation or conjecture with respect to causal connection is inevitable in any case, particularly where the evidence takes the form of an omission. In any event, many prior pronouncements of this and other Courts make it plain that the issue of causation is one for the jury, despite the necessity for speculation or conjecture in determining causation.

Thus, in *Lavender v. Kurn* (supra), the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Indeed, far more speculation and conjecture were necessary to establish negligence and causation in *Lavender v. Kurn* (supra), as well as in *Tiller v. Atlantic Coast Line R. Co.* (supra). The latter involved the running down of an

employee by an unlighted engine of the railroad, and the defendant had contended that the cause of death was speculative or conjectural. So too, in *Tennant v. Peoria & P. U. Ry. Co.* (supra), there was no direct evidence as to decedent's precise location when he was run over. The negligence of the railroad lay in its failure to ring a bell. Recovery was allowed although causal connection by failure to ring the bell and decedent's death was even more speculative than in this case. Likewise, in *Kurimisky, Admx. v. Unity Rys. Co.* (supra), recovery was allowed for the unobserved death of an employee; a jury finding of causation was sustained although the only basis for recovery lay in the speculative and conjectural hypothesis that the decedent may have been jerked off the train by a sudden stop and even though there was no direct evidence of any sort that he had been so jolted off the train. See also *Reynolds v. Texas & Pac. R. Co.* (supra), and *Kirincich v. Standard Dredging Company* (supra). See also *Casey v. American Export Lines* (supra), where the Court said at page 327:

> "The defendant contends further that in any event there was no proof of causal relation between the charges of negligence and the death of Captain Casey. It must be conceded that in the absence of proof of such causal connection, the defendant's negligence is not actionable. St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 347, 46 S. Ct. 520, 70 L. Ed. 979; Chicago M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041. It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire-hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. Cf. Di Nicola v. Pennsylvania R. Co., 2 Cir., 158 F. 2d 856, 857. But almost every verdict of a jury involves the element of speculation or conjecture to some extent."

Not only may causation be established despite conjecture and speculation, but *Coray v. So. Pac. Ry.* (supra), would seem to make it clear that under the Federal Employers' Liability Act even "substantial" cause is not required. It is enough that the injury or death results "in whole or in part" apparently in *any* degree from the negligence of the defendant. Even ignoring the other cumulative evidence of negligence and causation, certainly the jury was justified in finding that the failure to blow the whistle was at least a contributing factor.

It is remarkable that in the penultimate paragraph of the opinion of the Court of Appeals, after having complained that the employee failed to "demonstrate" causation, and having objected to the intrusion of "speculation", the Court, with amazing legal malapropism, cites as authority only cases in which the employee prevailed and in which to do so, speculation and conjecture were necessary. Significantly, the Court failed even to mention, let alone to attempt to distinguish, *Lavender v. Kurn* (supra), and *Myers v. Reading Co.* (supra).

In *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, 952 (1950), the defective condition of a coupler, in violation of the Safety Appliance Laws, had been an established fact, known to the plaintiff, prior to his going between the cars for the purpose of adjusting a coupler, when he sustained his injury. Obviously, the injury was not the proximate result of the defective coupler, within the meaning of ordinary tort law. However, the defective coupler was, nonetheless, in whole or in part, a contributing factor in producing the injury, by necessitating the presence of the plaintiff between the cars. There, too, as here, the carrier argued that there was no causal relationship, but merely a condition. Said the Court, in reply:

> "And as to causal relationship, the court in such a case equally has no right to direct a verdict on legalistic refinements between remote and immediate causation. Cf. Carter v. Atlanta & St. Andres Bay Ry. Co.,

supra, 338 U. S. 430, 70 S. Ct. at pages 228 and 229. The Federal Employers' Liability Act, 45 U. S. C. A. §51 et seq., which is the vehicle of suit for injury from a violation of a Safety Appliance Act, gives the employee a recovery right, even though the violation has been only 'in part' responsible for the injury. 45 U. S. C. A. §51. The causal question therefore too must be allowed to go to the jury in every case where there is probative evidence from which it would be rationally possible for any one to be persuaded that the violation has been 'a contributory proximate cause' of the injury. Coray v. Southern Pacific R. Co., 335 U. S. 520, 523, 69 S. Ct. 275, 277, 93 L. Ed. 208. The choice between the conflicting theories of causation, each of which is a rational possibility on some probative fact or facts, is one which the jury alone is entitled to make. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572."

In *Eglsaer v. Scandrett*, supra, at 565, 567, the Court said:

"Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence *'in part'* results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' * * * if the injury or death resulted *'in part'* from defendants' negligence, there is liability.

"The words 'in part' have enlarged the field or scope

of proximate causes * * * in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident. Such a rule found some support in Wisconsin before the statute in question was passed. In Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N. W. 532, 533, 7 L. R. A., N. S., 955, the court said:

'"* * * The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom. The act of one creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, provided such events are natural and probable, and provided the probability of injury might be reasonably anticipated. In both the Winchel v. Goodyear (126 Wis. 271, 105 N. W. 824), and Yess v. Chicago B. Co. (124 Wis. 406, 102 N. W. 932), cases the intervening event was a slipping of the person injured by reason of surrounding conditions, thus bringing himself within the peril which the defendant had created, and it was held that such events might, by a jury, be

considered natural and probable under all the circumstances."

C. The judgment of the Court of Appeals deprives plaintiff of the right to trial by jury.

This Court has repeatedly held that the right to trial by jury in Federal Employers' Liability cases is a basic and fundamental feature of plaintiff's remedy.

Bailey v. Central Vermont Ry. (supra);
Tennant v. Peoria & P. U. Ry. Co. (supra);
Lavender v. Kurn (supra).

The right to jury trial with respect to issues of causation is as essential an ingredient of the plaintiff's remedy as the right to a jury determination of an issue of negligence. So this Court has indicated on several occasions. See

Tennant v. Peoria & P. U. Ry. Co. (supra);
Coray v. So. Pac. Ry. (supra);
St. Louis Southwestern Ry. Co. v. Ferguson (supra);
Eglsaer v. Scandrett (supra).

The vast majority of the pronouncements of this Court as to the right to a jury determination of the issues have dealt with problems of negligence. It is respectfully submitted that the Court should take this opportunity to remove all doubt which may persist with respect to a similar right to a jury determination of issues of causation.

Cf. *Casey v. American Export Lines* (supra).

CONCLUSIONS.

It must be apparent that the Court of Appeals erred in that:

(1) It completely overlooked a number of other substantial items of negligence as to which causation is indisputable or which at least presented clear issues for the jury;

(2) It required a physical "demonstration" of a causal connection between the omission to sound the whistle and decedent's death;

(3) It has given legal life to the hitherto rejected, dead doctrine of "but for" demonstration in causal relationship. This judicially created wrinkle is a new effort to atrophy the Federal Employers' Liability Act, without legislative warrant for this device, and contrary to the express interpretive mandate of this Court in *Jamison, et al. v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440 (1929);

(4) It erred in depriving the plaintiff of a right to jury trial on issues of causation, in violation of prior rulings of this Court and in contradiction to the rulings of other Courts of Appeal and of the Supreme Court of Pennsylvania.

A Writ of Certiorari should be granted in this case; the judgment of the Circuit Court of Appeals should be reversed forthwith and the judgment for the plaintiff reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 427.

October Term, 1950.

ELIZABETH HEALY, Administratrix of the Estate of John E. Healy, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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No. 427.

OCTOBER TERM, 1950.

ELIZABETH HEALY, ADMINISTRATRIX OF THE ESTATE OF JOHN E. HEALY, DECEASED,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit (R. 189) is reported in 184 F. 2d 209.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., Section 1254).

QUESTION PRESENTED.

Whether the Court of Appeals erred in directing the entry of judgment for respondent on the ground that on the facts petitioner had failed to show any negligence on the part of the respondent that contributed to the death of the decedent.

STATUTE INVOLVED.

Section 1 of the Federal Employers' Liability Act (Act of April 22, 1908, Chapter 149, as amended by the Act of August 11, 1939; 45 U. S. C. A., Section 51) provides:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

STATEMENT.

The body of petitioner's decedent, John E. Healy, was discovered, having been fatally injured, on December 4, 1944 beside respondent's main line tracks at Cresson, Pennsylvania. The facts concerning the accident are not in dispute and were all shown by petitioner's witnesses as a part of petitioner's case, and established merely the death of the decedent, without any evidence of the cause of death or that respondent could or should have done anything to prevent it.

The deceased was a 44-year-old track laborer whose regular place of work was 8 miles from the place of the accident (R. 47a). Several days before the accident the deceased was informed that a United States war bond rally would be held on the morning of December 4, 1944 at the Hall of the Loyal Order of Moose in the town of Cresson (R. 41a). Attendance at the bond rally was not compulsory and the employees could go or not, as they chose, but those who did attend were paid for their time (R. 61a).

When the deceased left home on the morning of the accident he told his wife that he was going to the bond rally with the rest of the men and that he was also going to the supervisor's office to see what had become of "that one bond he should have received before and didn't re-

ceive'' (R. 10a, 11a). No basis for his reported belief that a bond was overdue was shown or existed. When he left home he was wearing a tan top coat and a hunting cap, which was brown and tan with blue stripes (R. 12a).

When the truck, which brought the decedent and others from Gallitzin, arrived in front of the Moose Hall in Cresson, all the other men, including one who was 70 years old (R. 65a), got off the truck unassisted, but the deceased remained in it (R. 53a). He told the older man, DeHaven, that he did not feel well that morning, and asked to be helped off the truck (R. 53a, 64a, 65a). DeHaven helped the deceased get off the truck and walked with him from the curb to the door of the Moose Hall (R. 54a).

This was the last time and place any witness saw Healy alive. His body was subsequently found more than three blocks away, beside one of the respondent's tracks near its Cresson station. There is a complete ''hiatus'' in the evidence (R. 139a) between these two unrelated facts.

The respondent's station in the town of Cresson was three blocks north and west of the Moose Hall (R. 151a, Plaintiff's Exhibit 1). Cresson is on the respondent's main line from New York to Chicago and the tracks there are elevated 15 feet above street level (R. 59a). The station building was on the south side of the tracks, and the supervisor's office was on the north side of the tracks and 500 feet east of the station (R. 60a, Plaintiff's Exhibit 1). To permit safe passage from one side of the tracks to the other, the respondent had constructed a pedestrian underpass or tunnel under all the tracks, from which covered stairways led up to the waiting platforms and to the north side of the tracks (R. 59a, 60a, Plaintiff's Exhibit 1). Other than by the safe route provided by the respondent through the underpass, there was no way to get to the track level except by climbing up over a 15 foot bank between the street and the tracks (R. 59a). At the track level there was a wooden baggage crossing which connected the station building on the south side of the tracks with the platforms

between the tracks and on the north side. The platforms were about 400 feet long and the baggage crossing was in the center and thus about 200 feet from either end (Plaintiff's Exhibit 1).

At about 8:20 A. M., a long freight train, in which there were about 70 cars (R. 76a), was moving eastwardly toward Cresson station at about 5 miles per hour (R. 13a, 14a, 15a, Plaintiff's Exhibit D-1). The engineer on the leading engine of this train was, at the time of the trial, in a hospital, and the petitioner offered in evidence two signed statements made by him and also offered portions of his deposition, which had been previously taken by the petitioner. The two statements were produced by the respondent in response to petitioner's subpoena and were marked, respectively, D-1 and D-2. The petitioner then offered the two statements in evidence as part of her case (R. 36a, 37a), and suggested that they be renumbered as petitioner's exhibits. Because the statements had been referred to previously (R. 32a), the trial judge preferred not to change the numbers (R. 36a).

The engineer said (R. 154a, Plaintiff's Exhibit D-2) that it was daylight at the time, the weather was cold and hazy, and there was snow on the ground. He had shut off the power and was applying the independent brake because the next block signal was set against him (R. 14a, Plaintiff's Exhibit D-2), indicating that another train was preceding him by a short distance on the same track.

He was leaning out of the window on his side of the cab and looking ahead (Plaintiff's Exhibit D-2). The engine was equipped with an automatic bell, which was started ringing before the engine reached the west end of the station, which rang constantly as the engine approached and passed the station, and which continued to ring even after the engine came to a stop (R. 23a, 24a, 26a, 33a, 34a, 35a). Although it was after 8 o'clock in the morning, the engine headlight was on "dim", which "gives definite light that any person can see", and the headlight was not obstructed by ice or otherwise (R. 21a, 22a).

As he approached Cresson station, the engineer saw a man, dressed in an overcoat of a yellowish cast, who crossed the tracks at the baggage crossing (R. 15a, 16a, 23a). This man crossed from south to north and "had plenty of time", and the engineer testified that "from where he was and the position I was in, I could get a full view of the station, and he got clean over onto the station platform", which was on the north side of the tracks (R. 15a, 16a, 20a). It was the petitioner herself who offered this uncontradicted testimony, that the person referred to got *completely across the tracks in safety,* and the petitioner also offered the uncontradicted statement that the person referred to *was not the deceased* (Plaintiff's Exhibit D-2, R. 155a). The engineer never saw the deceased until after the accident (Plaintiff's Exhibit D-2, R. 154a).

Like all the other witnesses in the case, the fireman on the same engine was a witness for the petitioner. He testified that his first duty was taking care of the fire and the steam (R. 81a), but when the engine reached the western end of the station platform, he looked ahead and observed the full length of the platform to its eastern end, which was 400 feet away (R. 83a, 84a, Plaintiff's Exhibit 1). When the engine came nearly to the eastern end of the platform, the fireman leaned out of the cab window (R. 70a) to check the block signal, which was about 1600 feet ahead of the station platform (R. 80a). He had to lean out of the cab in order to see the block signal because the track curved slightly to the right (R. 75a). As he did so, he thought he saw a bag of rags rolling on the ground beside the engine opposite its second or third driving wheel (R. 70a). He looked again and saw that it "was a shirt or a man's shirt or bag. It looked like a man then, rolling in the 6 foot—that is, on the outside of the rail" (R. 70a). The "6 foot" was the space between the platform and the rail nearest to it, and the body was about 15 feet west of the east end of the platform (R. 70a, Plaintiff's Exhibit D-2) and was therefore about 185 feet east of the wooden

baggage crossing (Plaintiff's Exhibit 1). The fireman called to the engineer to stop the train, the engineer immediately applied the brake, and when the train stopped, the body was still outside of the rails and was beside the third car from the engine (R. 74a, 77a).

There was no evidence as to how long the body of the deceased had been where it was first seen, and no evidence as to how it got there. The block signal was set against the train beside which the deceased was first seen, indicating that another train was preceding it. The engineer saw the man in the yellowish overcoat as he was crossing the track at the baggage crossing and saw also that he had gotten completely across the track. The engineer later saw the body of the deceased lying on the ground 185 feet beyond the crossing. The engineer's uncontradicted testimony was that the man in the yellowish overcoat and the deceased were two different persons (Plaintiff's Exhibit D-2). Although there was snow on the ground (R. 155a), there was no evidence that the body of the deceased had been dragged. There was no evidence that the deceased had come in contact either with the front of the engine or with any part of the engine forward of a point 10 or 15 feet back from the front end. There was no evidence that the body of the deceased was in contact with any part of the engine or train during the interval between the time the engineer was told to stop the train and the time when the stop was effected. The body remained in the same place, outside of the rail, that it was when the fireman told the engineer to stop the train (R. 77a). There was no evidence that the deceased was ever under any wheel of the engine, and when the fireman was specifically asked, he stated that the body was beside the wheel of the engine (R. 74a). A brakeman who was on the engine and went back to pick up the body (R. 21a), was not called as a witness nor did the petitioner offer any evidence whatever to indicate the nature of the injuries suffered by the deceased, or the actual cause of his death.

At the conclusion of the petitioner's case, the respondent moved for a directed verdict (R. 132a) on the grounds that there was no evidence of the cause of the death of the deceased, no evidence of any negligence on the part of the respondent, no evidence that any negligence on the part of the respondent was the proximate cause of the death of the deceased, and no evidence that the deceased was acting in the course and scope of his employment at the time of his death. The respondent's motion was denied (R. 132a) and the trial judge charged the jury that if the deceased was on his way to the office of the supervisor in connection with a United States war bond, he was, as a matter of law, acting within the scope of his employment (R. 138a). Exception was taken to this portion of the charge (R. 148a) and to the refusal of the trial judge to affirm the respondent's points for charge relating to the burden of proof as to the proximate cause of the death. The jury returned a verdict for the petitioner in the amount of $15,170.60. Respondent's motion for judgment in accordance with its motion for a directed verdict was denied by the trial judge. The Court of Appeals reversed the judgment of the trial court for lack of proof "of any negligence on the part of the defendant company which contributed to the accident" (R. 193a).

ARGUMENT.

The petition shows on its face that the question presented does not meet the requirements the Court has laid down for granting of the writ of certiorari. *Supreme Court Rule 38* (*5*). The case involves no general principle that requires or deserves review by this Court; the ultimate question relates merely to the application of accepted principles to the particular facts here involved.

In any event, the decision below was correct. The petitioner's proof was insufficient to justify submission to the jury of the issue of respondent's negligence. And even if negligence should be assumed there was no evidence to sustain a finding by the jury that any act or omission of the respondent contributed to the death of the deceased.

I. This Case Presents No Question That Requires or Deserves Review by This Court.

The only question presented in this case is whether the Court of Appeals correctly held on the facts that the plaintiff had failed to make any showing that negligence on the part of the defendant Company had contributed to the death of the deceased. The decision of this question turns on the particular facts involved. No general principle is in controversy; the disputed issue relates merely to the application of well settled rules to the circumstances of this particular case. The decisions of this Court under the Employers' Liability Act disclose a consistent pattern of principle, which is not disputed in this case. In cases in which there is conflicting probative evidence, or in which conflicting reasonable inferences may be drawn from probative evidence, this Court has held that the conflicts must be resolved by a jury. On the other hand, if there is no conflict in the evidence and no probative evidence from which inferences favorable to the plaintiff can be drawn, this Court has either denied certiorari or affirmed the decision below. *Roberts v. Alabama Great Southern Railroad*

Co., 340 U. S. 829 (1950); *Emmick v. Baltimore & Ohio Railroad Co.*, 340 U. S. 831 (1950); *Roberts v. Missouri-Kansas-Texas Railroad Co.*, 340 U. S. 832 (1950); *Gentry v. Seaboard Air Line Railroad Co.*, 340 U. S. 853 (1950); and see the appendix to the concurring opinion of Mr. Justice Douglas in *Wilkerson v. McCarthy*, 336 U. S. 53, 68-73 (1949). The case at bar falls in the latter category. All of the evidence was offered by the petitioner. There is no conflict in the evidence that requires resolution by a jury and no basis in the evidence from which inferences favorable to the petitioner's case may reasonably be drawn. The evidence therefore did not meet the initial judicial test which is a basic and integral part of the jury trial system.

The decision of the Court of Appeals is not in conflict with the decision of another court of appeals on the same matter, nor did the Court of Appeals decide any important question of Federal law which has not been but should be settled by this Court. None of the other grounds stated in Rule 38 as the basis for granting a petition for a writ of certiorari is present. The petition should be denied.

II. The Evidence Was Insufficient to Warrant Submission to the Jury of the Issue of Respondent's Negligence.

All of petitioner's arguments are based upon two premises which are (1) essential to her case, (2) completely unsupported by any evidence, and (3) the reverse of the uncontradicted evidence she offered at the trial. These premises are, first, that the decedent was injured at a crossing where the respondent had a duty to anticipate his presence, and, second, that the engineer saw the decedent on the track but failed to warn him (Petitioner's brief pp. 3, 4, 10, 11, 12, 14). From the first of these two false premises the petitioner raises a similarly unsound corollary that the engineer and fireman both failed to observe the crossing as they approached it (Petitioner's brief pp. 4, 10, 11).

The petitioner's uncontroverted evidence, however, showed that Healy, when first seen lying beside the track, was not at the crossing but 185 feet away from it, where there was no crossing of any kind. An engine moving at 5 miles per hour could not throw a man 185 feet ahead of it, and although there was snow on the ground, there was no evidence that the body was dragged, or that it was ever in contact with the engine except at the moment the fireman first saw it. The engineer saw the man at the baggage crossing—who was not described as wearing a blue-striped hunting cap which Healy wore—and later he saw Healy 185 feet away from the crossing. The only evidence was that the engineer continuously observed the crossing and saw the first man get "clean over onto the station platform", that the man at the crossing and Healy were two different people, and that the engineer never saw Healy until his prone body was discovered beside the tracks on the opposite side of the slowly moving engine. Likewise, the petitioner's uncontroverted evidence was that the engineer was leaning out the window on his side of the engine, looking ahead; and the fireman, whose primary duty, as his title implies, was taking care of the fire, looked ahead and observed the full length of the platform when the engine was at its western end, and looked again before the engine reached the eastern end. It was this second time the fireman looked ahead that he noticed the body of the deceased on the ground beside the tracks.

The petitioner states repeatedly (Petitioner's brief pp. 3, 4, 12) that the approach of the train was "noiseless", yet her own uncontroverted evidence was that the train consisted of about 70 freight cars, at the head of which was a large over-the-road steam engine, whose automatic air-controlled bell began to ring before the engine reached the far western end of the platform, and continued to ring constantly until after the decedent's body was discovered and the engine stopped. Throughout that period during which the engine headlight was on and its bell constantly ringing,

the train was moving at 5 miles per hour, a rate of speed which many people can walk.

As the Court of Appeals pointed out (R. 193, 194), the petitioner simply failed to prove any negligence at all and certainly none which contributed in whole or in part to the accident because, on viewing the record in the light most favorable to the petitioner, there was no evidence from which an inference could be drawn that Healy was ever on the track—either at the crossing where the respondent might have anticipated him, or at the point where his body was found—or that Healy had ever been in a position of danger near the track and ahead of the engine at a time when he could have been seen and avoided, or that a blow from the engine caused his death. This is the basic difference between the petitioner's case and all the decisions of this Court upon which she relies, in each of which there was affirmative evidence pointing directly to an act of negligence as the cause of the accident or to a violation of the Safety Appliance Act which made proof of negligence unnecessary.

Thus in *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54 (1943) there was evidence that in the course of his work Tiller was checking car seals in a classification yard where the defendant knew, or should have known, that such work was regularly conducted. He "was standing between two tracks" at night "using a flashlight" when he was struck by the rear of a negligently unlighted train backing toward him. In *Bailey v. Central Vermont Ry.*, 319 U. S. 350 (1943) Bailey, in the course of his work, "walked out on the stringer on the bridge" which was "18 feet above the ground" and where "the only available footing was about 12 inches wide" and where "there was no guard rail". He was attempting to open the doors of a hopper car with a large wrench, which the defendant knew might jerk violently when Bailey accomplished what he was trying to do. In *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944) Tennant's "duties included staying near the rear or north

end of the engine as it made a backward movement", "the engine had remained stationary for several minutes, during which time the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement" without ringing the engine bell. In *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600 (1945) in the course of his work and over his objection, Blair was "commanded" to move, by means of a small hand truck, three slippery steel tubes, each 30 feet long and weighing 1,000 pounds. When one of the tubes started to slip from the small truck, two fellow workers let go, which caused the truck to kick back and injure the plaintiff. In *Lavender v. Kurn*, 327 U. S. 645 (1946) there was "evidence that Haney's duties required him to wait at the switch north of the track". His body was found close to the switch where his duties required him to be and where his presence should, therefore, have been anticipated. "The curled end [of the mail hook] could thus be swung out to a point 3½ feet from the rail and about 73 inches above the top of the rail". There was undisputed medical testimony that the cause of death was a fracture of the skull by "some fast moving small round object" and evidence that the cause of death was a blow from a mail hook swinging out from the side of a train moving past a point where the decedent could reasonably have been anticipated.[1]

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1. *Myers v. Reading Co.*, 331 U. S. 477 (1947) and *Coray v. Southern Pacific Ry.*, 335 U. S. 520 (1949), cited by petitioner, were both decided under the Safety Appliance Act, which did not require an independent determination of negligence because of the absolute duty imposed by that Act. In the *Myers* case a hand brake unexpectedly kicked back and threw the plaintiff to the ground and, in the *Coray* case, "the train unexpectedly stopped . . . because the air in its brake lines escaped, thereby locking the brakes . . . because of the violation of the Federal Safety Appliance Act . . .".

In each of the cases cited by petitioner there were *probative facts* from which both the negligence of the defendant and the causal connection between that negligence and the injury for which recovery was sought could reasonably be inferred. The irreconcilable difference between all those cases and the instant case is the complete absence here of probative facts which are necessary prerequisites of jury consideration.

Negligence cannot be determined in a vacuum. It is the lack of due care "under the circumstances". The Court of Appeals for the Third Circuit is an able court thoroughly familiar with the Employers' Liability Act and the decisions of this Court thereunder, and is aware of a widely held feeling that the Act is sociologically deficient, but as it said in a decision which was affirmed by this Court[2]: "But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case".

III. There Was No Evidence to Sustain a Finding That Any Negligence of the Respondent Caused or Contributed to the Injury.

In order to establish the right of recovery claimed under the Employers' Liability Act, the petitioner was required to prove not only that the defendant was negligent, but also that such negligence was the proximate cause, in whole or in part, of the injury for which suit was brought. *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54 (1943); *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944). "The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events": *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484 (1943).

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2. *Eckenrode v. Pennsylvania Railroad Co.*, 164 F. 2d 996, 1000 (C. C. A. 3rd, 1947) Aff'd, 335 U. S. 329 (1948).

The necessity of a proximate causal relationship between the negligence alleged and the injury, was recently illustrated in *Reynolds v. Atlantic Coast Line R. R. Co.*, 336 U. S. 207 (1949). Under the applicable state practice, the plaintiff there set forth all the facts proposed to be proved at the trial, and the defendant demurred on the ground that the facts set forth did not constitute a cause of action. The demurrer was sustained by the trial court, by the State Supreme Court and by this Court, which said at 336 U. S. 207, 208, 209:

> "The Alabama Supreme Court conceded that the complaint adequately charged negligence . . . It held, however, that the facts alleged did not show that the accident resulted proximately, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred."

Although in his charge to the jury the trial judge inferred (R. 139a) that the engineer saw the deceased crossing the tracks at the baggage crossing, after which the trial judge said there was "an unfortunate hiatus" in the evidence, his inference was exactly the reverse of the petitioner's uncontradicted evidence that no witness saw the deceased alive except when he was over three blocks away complaining that he did not feel well. Although the trial judge referred to the body found beside the train as "a mangled body" (R. 138a) the record is completely devoid of evidence supporting such a statement. Neither the condition of the body nor the cause of death was shown. The simple and only fact proven was that the body of the deceased was on the ground outside of the tracks on the left side of a slowly moving eastbound engine. It is absolutely impossible to state or infer how long the body had been where it was found, whether in reaching that position the deceased had been walking or running or standing, or, if moving, whether he had been moving north, south, east or west. It is equally impossible to state or infer whether

Healy was alive or dead when the fireman first saw him and, since the body remained in the same place *outside the rail* while the train was being stopped, it is impossible to infer that the immediate "service" rather than "emergency" application of the brakes contributed in the slightest to the decedent's injury.

The impossibility of establishing the causal relationship between the respondent's alleged negligence and the death of the deceased in such circumstances was shown in *Trust Co. of Chicago v. Erie R. R. Co.*, 165 F. 2d 806, 809, 810 (C. C. A. 7th, 1948) *Cert. den.* 334 U. S. 845 (1948):

> "It is all speculation as to the manner in which the decedent met his death. That is the trouble with the plaintiff's case. One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn. . . .
>
> "A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was that the defendant did that was negligent and caused the accident. If there is some conflict in the evidence as to what the defendant did or did not do, which it should or should not have done, there may be a conflict for a jury to resolve, as was stated in Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916. In our case, there is no conflict in the evidence. There is a woeful lack of evidence, which would leave a jury to nothing but speculation. The Supreme Court has recently said that where the jury is left to speculation only, the trial court must step in and direct a ver-

dict. . . . The plaintiff argues that there was death by the defendant's train, therefore the defendant was negligent. That is arguing backward from effect to cause and not from cause to effect. The plaintiff must first prove the defendant's negligence which caused the injury. This it clearly failed to do."

If the petitioner had produced evidence as to where the deceased was, and that he was alive and in a position of danger for a sufficient interval of time to permit the train crew to see him and avoid coming in contact with him, her evidence would have warranted submission of the case to the jury on the issue of whether the respondent's negligence was the proximate cause of his death—but she did not do so. [Cf. *Mostyn v. Delaware L. & W. R. Co.*, 160 F. 2d 15 (C. C. A. 2nd, 1947) *Cert. den.* 332 U. S. 770 (1947), in which the plaintiff was shown to have been asleep on the track.] In *Boston & Maine R. R. v. Coppellotti*, 167 F. 2d 201 (C. C. A. 1st, 1948) the plaintiff made out a very much stronger case than was done here, in that the defendant there admitted that the deceased was struck by an engine while he was lying on the track. However the court said, pp. 203, 204:

"The laborer wanders out of sight. A regular scheduled train comes through. . . . We are told only that the decedent while lying on the track is run over. How the decedent got there and how long he had been there is left to conjecture. . . . On the basis of this meager evidence, we are asked to sustain a jury finding for the plaintiff. Yet the Supreme Court has said that the burden is on the plaintiff to present probative facts from which negligence and causal relation could reasonably be inferred; that the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making allowance for all reasonable possible inferences favoring the party whose case is attacked. . . . There is no evidence to support an

inference that the decedent was on the track in the path of the locomotive a long enough time before the accident to give the engineer an opportunity to take action to avoid running over him. We are told that the fact that the decedent while lying on the track is run over at a place just before an area where a large group of men is working is enough to support a jury's finding of negligence on the part of the engineer resulting in death to the decedent. Even if it could be said that such an accident is an extraordinary occurrence which does not usually occur in the absence of negligence, there is no basis for a jury's finding that it was some act of the defendant rather than of the decedent that caused the accident. There is no evidence—either circumstantial or direct—from which negligence of the defendant can reasonably be inferred."

In the instant case there was likewise no basis for a jury's finding that it was some act of the respondent, rather than of the deceased, that caused his death, and the lower court therefore properly entered judgment for respondent.

It is also obvious that petitioner's references to the absence of a whistle signal are not helpful. They ignore completely the facts established by the petitioner herself, that no rule or regulation required the whistle to be blown (R. 108a), that the only person known to have been on or near the track before the accident crossed it in safety and was not the decedent (R. 15a, 16a, 20a, 155a), and that there was nothing to show any possible connection between lack of a whistle on a slowly moving train (R. 15a) whose bell was ringing (R. 24a, 35a) and the death of a man who was not shown by any evidence to have suffered any violence or injury whatever.

This Court has repeatedly denied certiorari, or affirmed the entry of judgment for respondent, where the petitioner failed to show negligence on the part of the respondent

which caused or contributed to the injury. *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943); *Fantini v. Reading Co.*, 147 F. 2d 543 (C. C. A. 3rd, 1945) *Cert. den.* 325 U. S. 856 (1945); *Scarborough v. Pennsylvania R. R. Co.*, 149 F. 2d 636 (C. C. A. 3rd 1945) *Cert. den.* 326 U. S. 755, *Re-hearing denied* 326 U. S. 809 (1945); *Chisholm v. Reading Co.*, 157 F. 2d 768 (C. C. A. 3rd 1946) *Cert. den.* 329 U. S. 807 (1947); *Trust Co. of Chicago v. Erie R. R. Co.*, 165 F. 2d 806 (C. C. A. 7th, 1948), *Cert. den.* 334 U. S. 845 (1948); *Eckenrode v. Pennsylvania Railroad Co.*, 335 U. S. 329 (1948); *Reynolds v. Atlantic Coast Line R. R. Co.*, 336 U. S. 207 (1949); *Scocozza v. Erie R. R.*, 171 F. 2d 745 (C. C. A. 2d, 1949) *Cert. den.* 337 U. S. 907 (1949). Certiorari should therefore be denied in this case also.

IV. Petitioner Was Not Improperly Deprived of a Jury Trial.

In her brief, petitioner apparently deliberately misinterprets the opinion of the Court of Appeals as having required the petitioner to prove the causal connection between the alleged negligence of the respondent and the injury for which suit was brought "with mathematical or absolute certainty" (Petitioner's brief p. 9). Such is clearly not the effect of the decision of the lower court which held, in accordance with the decisions of this Court, and in accordance with the basic concept of the Anglo-Saxon jury trial system, that before a proponent is entitled to have his case submitted to a jury he must first present probative facts to support the conclusion he seeks. This basic concept has been variously expressed. Thus in *Lavender v. Kurn*, 327 U. S. 645 (1946) the Court made it clear that there must be "an evidentiary basis for the jury's verdict" and "when there is a complete absence of probative facts to support the conclusion reached" it is "reversible error" to let a jury verdict stand.

In *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943) this Court said at page 479:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co. v. Hughes, supra; Baltimore & Ohio R. Co. v. Groeger,* 266 U. S. 521, 524. Cf. *Gunning v. Cooley,* 281 U. S. 90, 94; *Commissioners v. Clark,* 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

As Professor Wigmore said in IX Wigmore on Evidence, § 2487:

"Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits.

"The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course;* that each party must first with his evidence pass the gauntlet of the judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the other burden of proof (in the sense of the

risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them." (Emphasis by Professor Wigmore.)

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1950. No. 427.

ELIZABETH HEALY, Administratrix of the Estate of JOHN E. HEALY, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR RE-HEARING OF ORIGINAL PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Elizabeth Healy, Administratrix of the Estate of John E. Healy, deceased, and the above named petitioner, and respectfully petitions this Honorable Court to grant

this petition for a re-hearing of the original petition for certiorari, which was denied by this Court on February 26, 1951.

DECISION AND JUDGMENT OF THE COURT BELOW.

The opinion of the Court below, as amended on October 10, 1950, is reported in 184 F. 2d 209 (C. A. 3, 1950). The opinion appears on page 181 of the Record filed with the original petition for certiorari.

NATURE OF THE CASE AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

The nature of the case and a summary statement of the matter involved is found in petitioner's original petition for certiorari and is therefore not repeated here.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered September 11, 1950. The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., §56) and the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., §1254).

QUESTIONS PRESENTED.

1. Did not the Court of Appeals (Third Circuit) err in reversing judgment, entered on a verdict for the plaintiff, on the sole ground that no causal connection had been "demonstrated" between what the Court conceded to be the "negligence" of defendant's engineer in failing to sound a warning whistle, and the death of plaintiff's decedent, where the Court overlooked, failed to consider, or even to mention a number of other glaring items of substantial negligence as to which there could be no question of causation, and instead treated the defendant's failure to sound the whistle as "the only conceivable negligence"?

2. Even if failure to sound the whistle was the only negligence of the defendant's employees, as suggested by the Court of Appeals, did not the Court err in holding as a matter of law that such negligence was not a cause in whole or in part of the death, despite the jury's verdict to the contrary after the charge by the Trial Court had left the question of causation to the jury?

3. Does not the decision of the Court of Appeals deny to the plaintiff a right to a jury trial on the questions of negligence and causation as guaranteed by the Federal Employers' Liability Act, the Constitution of the United States, and repeated decisions of this Court?

REASONS RELIED UPON FOR ALLOWANCE OF PETITION.

1. The decision of the Court below, establishing a new standard of negligence in Federal Employers' Liability Act cases, contrary to the letter and spirit of *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949), and emasculating the 1939 amendments to the Act, will, if permitted to stand, encourage the re-litigation of cases under the F. E. L. A. and invite a flood of appeals. Therefore, under Rule 38, a writ of certiorari should be granted to clarify the law and avoid conflict among the Circuits.

2. The opinion of the Court of Appeals is obviously in conflict with decisions of this Court, with respect to plaintiff's right to a jury determination of issues of causation, and clearly warrants granting of the Petition for Re-Hearing on Writ of Certiorari and reversal of the judgment of the Court of Appeals. See, e. g.,

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944);

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946);

Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949);

Penn v. Chi. and N. W. Ry. Co., 335 U. S. 849, 69 S. Ct. 79 (1948).

3. Even assuming that the only negligence on the part of the defendant was the failure to sound the whistle, the Court of Appeals was guilty of patent error of law (1) in

holding that no causal connection had been made out merely because causal connection had not been "demonstrated" with physical absoluteness, (2) in rejecting the implicit finding of the jury on the issue of causation by treating the issue of causation as one of law rather than fact.

4. The opinion of the Court of Appeals is clearly in conflict with decisions in other Circuits with respect to the plaintiff's right to a jury determination of the issue of causation. See, e. g.,

Casey v. American Export Lines, 173 F. 2d 324 (C. A. 2, 1949);
Eglsaer v. Scandrett, 151 F. 2d 562 (C. A. 7, 1945);
Kurimsky, Admx. v. Unity Rys. Co., 357 Pa. 521, 55 A. 2d 378 (1949).

5. The opinion of the Court of Appeals is clearly in conflict with its own decision with respect to the plaintiff's right to a jury determination on the issue of causation. See *Eiseman v. Pennsylvania R. Co.*, 151 F. 2d 222 (C. A. 3, 1945), presenting virtually the identical facts.

6. Assuming that certiorari should not be granted where, if there be error in the opinion of the Court below, it was predicated upon an erroneous evaluation of the facts, the decision in this case is clearly predicated upon an erroneous statement of the principles of law that control. It is true that this Court has considered these questions and has refused certiorari, two justices dissenting on the refusal. However, where it has been demonstrated that crucial legal questions are involved, this Court has granted certiorari although previously denied. See *Hickman v. Taylor*, 153 F. 2d 212 (C. A. 3, 1945), cert. den. 327 U. S. 808, 66 S. Ct. 961 (1946), vacated 328 U. S. 816, 66 S. Ct. 1337 (1946).

PRAYER.

Petitioner prays that a Writ of Certiorari be granted by this Honorable Court directed to the Court of Appeals for the Third Circuit to the end that the record in this case be reviewed by this Court, and that upon such review the judgment of the Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING OF ORIGINAL PETITION FOR CERTIORARI.

I. The decision of the Court below is in conflict with the settled interpretation of the Act and, if allowed to stand, will provoke excessive litigation.

The Federal Employers' Liability Act represents the legislative answer to the great social need for protecting railroad employees from the hazards of their occupation. The purpose of the Act was to provide a means within the framework of the jury system for equalizing the burdens of proof and responsibility between the employer and the employee. The 1908 Act abolished the fellow-servant rule. Subsequently the Act was emasculated by the courts *Chesapeake & O. R. Co. v. Nixon*, 271 U. S. 218, 46 S. Ct. 495 (1926); *Atlantic Coast Line R. Co. v. Driggers*, 279 U. S. 787, 49 S. Ct. 490 (1929). Congress, in 1939, amended

the Act specifically to bar the defenses of the fellow-servant rule and assumption of risk. The Court has repeatedly given effect to that legislative intent. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943); *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949). Moreover, other correlative legislation has imposed strict duties of care upon the employer. Boiler Inspection Act and Safety Appliance Acts, 45 U. S. A. §§1-23. The violation of any of these statutory safety requirements imposes absolute liability, irrespective of negligence. *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949). Such legislation is but a part of the trend, in tort law, to require legal responsibility without proof of moral culpability. Mr. Justice Holmes observed that

> "* * * while the terminology of morals [in tort law] is still retained, and while the law does still and always does, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmitting those moral standards into external and objective ones, from which the actual guilt of the party concerned is wholly eliminated."[1]

The purposes of the safety legislation and of the 1939 Amendments to the Act have been effectuated by the many rulings of this Court which have specifically confided to the jury the difficult problem of causal relationship between negligence or violation of a safety law or rule and the injury for which recovery is sought under the Act. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, 338

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[1] Holmes, The Common Law 38 (31st printing, 1938).

U. S. 384, 70 S. Ct. 200 (1949); *Carter v. Atlanta & St. A. B. Ry. Co.*, 338 U. S. 430, 70 S. Ct. 226 (1949).

When the 1939 amendments to the F. E. L. A. were passed, it was thought that the whalebone corset restraints of the statute had been discarded. In its stead, the railroad workers were given a "two-way stretch." This Court had held that under the F. E. L. A., a statute based on negligence, the approach would be as broad as the common sense of the communities which furnished the juries to hear these cases. This Court, generations ago, had said that it should be so. See *Jones v. East Tenn. R. R.*, 128 U. S. 443, 445 (1888):

> "We see no reason, so long as the jury system is the law of the land, and the juries made the tribunal to decide disputed questions of fact, why it should not decide such questions as these (negligence and contributory negligence) as well."

Had not Mr. Justice Butler, for this Court, in *Jamison v. Encarnacion*, 218 U. S. 635, 50 S. Ct. 440 (1929), said:

> "The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purpose for which enacted * * *"?

Although the Court in that case was considering the Jones Act, 46 U. S. C. A. §688, its holding and language are equally applicable to the F. E. L. A. They are parallel statutes, serving two broad and similar groups of employees.

Discussion of a compensation act for railroad employees is wholly irrelevant. But the possibility of such an alternative remedy has been suggested many times. Chief Justice Taft in 1929 advocated a compensation law for railroad

employees.[2] It is frequently alluded to in F. E. L. A. cases.[3] Since Congress has not seen fit to pass such a law, an imaginary compensation act for railroad employees does not solve the problem of the plaintiff in the case at bar. Nor would it be likely to improve the lot of other railroad employees.[4] Indeed, the railroad employees have expressed satisfaction with the type of remedy provided by the Act.[5] England recognized the shortcomings of a compensation law ten years ago and repealed the British act. Nevertheless, counsel in arguing for an outmoded and restrictive interpretation of the F. E. L. A. frequently invoke the non-existent compensation act for railroad workers to indicate a humane concern for the plight of the injured, maimed and fatally injured employee and his family. It is ritual without significance.

Congress has refrained, since the passage of the first

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[2] Richter and Forer, **Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers**, 36 Cornell L. Q. 203 (1951).

[3] See the remarks of Mr. Justice Frankfurter in **Tiller v. Atlantic Coast Line R. R.**, 318 U. S. 54, 63 S. Ct. 444 (1943):

> "But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence."

See his expression of similar views in the dissenting opinion in **Wilkerson v. McCarthy**, 336 U. S. 53, 65, 69 S. Ct. 413, 419 (1949). See also **Eckenrode v. Pennsylvania R. Co.**, 335 U. S. 329, 69 S. Ct. 91 (1948); **Raudenbush v. Baltimore & O. R. Co.**, 160 F. 2d 363 (C. A. 3, 1947); and dissenting opinion in **Carter v. Atlanta & St. A. B. Ry. Co.**, 338 U. S. 430, 70 S. Ct. 226 (1949).

[4] Richter and Forer, **Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers**, 36 Cornell L. Q. 203 (1951).

[5] 84 Cong. Rec. 9407 (1939). Senator Burke, in explaining the provisions of the 1939 Amendment, stated:

> "The representatives of the railroad brotherhoods appeared and presented a very full and clear justification for the measure. The Federal Employees Compensation Board approves the changes."

See also Sen. Rep. No. 243, 76th Cong., 1st Sess. (1939).

Federal Employers' Liability Act in 1906, and with full knowledge of these cases, from putting railroad workers under a compensation law. It has instead chosen to preserve to railroad employees their Anglo-American heritage of the right of trial by jury, while enlarging the protection granted under the Federal Employers' Liability Act.

The case at bar arose under the Federal Employers' Liability Act. The jury determined that the death was caused by the negligence of the engineer in failing to sound his whistle. The Court of Appeals, in reviewing this issue, has usurped the fact-finding function of the jury. It has departed radically from the well-established and wise interpretation of the law as laid down by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943) and in *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946).

It is absolutely impossible to distinguish the instant case from the case of *Eiseman v. Pennsylvania R. Co.*, 151 F. 2d 222 (C. A. 3, 1945). There, too, the case went to the jury solely on the question of whether a whistle had been blown or a bell rung. In that case, too, the employee was killed when run down by a train. There was absolutely no evidence to "demonstrate a causal connection between the failure of the engineer to sound the whistle and the happening of the accident, or that that failure contributed 'in whole or in part' " to the employee's death, as required by the Court of Appeals in this case; yet, nonetheless, the Third Circuit reversed a judgment n. o. v. entered by the Court below for the very reason that it now here ascribes in setting aside a verdict for the plaintiff, which has been passed upon not only by the jury, but by the trial judge in permitting the verdict to stand. In the *Eiseman* case, the Court said, at 224:

> "* * * if a witness was in a position where 'in all probability' he would have heard a bell signal if one had

been given, the issue of the giving of the signal is treated as one for the jury. See the clear and emphatic ruling of Judge Phillips in Union Pac. R. Co. v. Burnham, 10 Cir., 124 F. 2d 500, 502, and the authorities cited in the note to that opinion."

Re-hearing is prayed for because this is not merely a single piece of litigation. The decision in the case at bar, if not reversed, will not stand as a sport in the law. Rather, it will mark the beginning of the erosion of the rights of employees established by Congress under the F. E. L. A.

Following all legislation with high social purpose, the first attack is on its constitutionality. Having passed that hurdle, the opinion of the Court grants wide coverage. *Tiller v. Atlantic Coast Line R. Co.*, supra. The attack then shifts. The burrowing from within and below begins. Serious import is given to arguments which would originally have been considered sheer effrontery.

Legislation once passed and sustained is, in the public mind, a problem solved. A decision that seems but an innocuous distinction for just that *one* case can lead to the complete emasculation of a statute. Though the benefits of the law have been erased, the empty words remain on the statute books presenting a false and cruel deception to litigants and to the public. Such a result is more valuable to those who opposed the legislation in the first place than having no legislation at all. The statute is now harmless. It quiets the do-gooders.[6]

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[6] A new political party having for the first time in fifty years in Pennsylvania assumed charge of the state administration in 1935, the legislature, in fulfillment of its promise of social improvement, passed the Survival of Action statute in 1937, P. L. 2755 (Pa.). It provided for the same measure of damages in death actions as though the suit had been instituted during the lifetime of the deceased. Its first interpretation, in **Pezzulli, Admr. v. D'Ambrosia**, 344 Pa. 643, 26 A. 2d 659 (1941) established total and complete recovery for losses sustained. By 1949, **Murray v. Philadelphia Transportation Co.**, 359 Pa. 69, 58 A. 2d 323 (1948) had virtually disembowelled the Act.

Following the decision in the case at bar, the courts will be inundated by a flood of litigation to re-define and whittle away the rights granted under the F. E. L. A. and to re-define the Act and the functions of judge and jury. Every effort will be made to reinstate the narrow, legalistic approach to the law embodied in *Chamberlain v. Pennsylvania R. Co.*, 288 U. S. 333, 53 S. Ct. 391 (1933). That case has been implicitly overruled in *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), and *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944). Mr. Justice Rutledge vigorously opposed any such suggested return to such a position in many cases. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232 (1943). The reference to *Galloway v. U. S.*, 319 U. S. 372, 63 S. Ct. 1077 (1943) in the recent opinion in *Moore v. Chesapeake & O. R. Co.*, 71 S. Ct. 428 (1951), would perhaps cause reactions more severe than those recently ascribed to Bentham.

The dangers of permitting deviation from the broad, basic principles are evidenced in the history of litigation subsequent to *Kilpatrick v. Texas & P. Ry. Co.*, 337 U. S. 75, 69 S. Ct. 953 (1949). Following that case, in which the venue clause of the Act was interpreted to narrow the selection of a forum, the usual excesses in litigation occurred.[7]

Nineteen years ago, it was pointed out that the Supreme Court worked in a sterile field, re-litigating factual minutiae of cases arising under a single statute, namely, the Federal

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[7] See **DeVane v. U. S. Court of Appeals for the Fifth Circuit**, cert. den. Mar. 5, 1951, No. 302, Misc. Dkt., U. S. Supreme Court. Cf. **Ford Motor Co., et al. v. Ryan**, 182 F. 2d 329 (1950) and **Headrick v. Atchison, T. & S. F. Ry. Co.**, 182 F. 2d 305 (1950). This Honorable Court has, of its own motion, re-opened cases in which there was a conflict in the Circuits and the manifest possibility of future injustice, and granted certiorari. See **Lustig v. United States**, 338 U. S. 74, 69 S. Ct. 1372 (1949); **United States v. Shaughnessy**, 338 U. S. 521, 70 S. Ct. 329 (1950).

Employers' Liability Act.[8] Since that time, the interpretation of the law has been so thoroughly established[9] and so completely accepted by counsel and litigants all over the country that at this term of court only five petitions for certiorari in cases arising under the F. E. L. A. were sought. This is to be contrasted with the staggering amount of litigation under the various compensation acts.[10]

Limitation of certiorari can embrew more litigation than it stifles. Therefore, it is respectfully urged that this petition for re-hearing presents an appropriate case for the consideration of your Honorable Court within the letter and spirit of Supreme Court Rule 38.

II. Certiorari should be granted where error is not in possible misevaluation of the facts, but rather in the legal principles relied upon.

It has been suggested that certiorari should not be granted even where it may well be that the facts have been improperly evaluated by the Court of Appeals, so long as the basic legal principles have been recognized, understood and applied. See opinion of Mr. Justice Frankfurter in *Carter v. Atlanta & St. A. B. Ry. Co.*, 338 U. S. 430, 70 S. Ct.

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[8] Frankfurter and Landis, **The Supreme Court at October Term**, 1931, 46 Harv. L. Rev. 226, 244 (1932).

[9] **Wilkerson v. McCarthy**, 336 U. S. 53, 69 S. Ct. 413 (1949).

[10] Multitudinous questions of whether an injury "arises out of the employment" are certainly arid legal waste. Mr. Justice Murphy, in dealing with such a problem (which rarely gets into the federal courts), characterized the workmen's compensation acts as "deceptively simple and litigiously prolific." **Cardillo v. Liberty Mutual Insurance Co.**, 330 U. S. 469, 479, 67 S. Ct. 801, 807 (1947). The obstacles to recovery and the legalistic defenses deplored by courts and counsel considering the F. E. L. A., are not eliminated under a compensation act. See **O'Leary v. Brown-Pacific-Maxon, Inc.**, 71 S. Ct. 470 (1951); Richter, and Forer, **Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers**, 36 Cornell L. Q. 203 (1951).

226, 231 (1949). Although this rule may work hardship in certain instances, this is not the problem in the case at bar. In this case, the Court below has laid down a principle of law on causation that flagrantly and diametrically opposes all that this Court has repeatedly stated to be the law in *Tennant v. Peoria & P. U. Ry. Co.*, supra, *Lavender v. Kurn*, supra, *Coray v. So. Pac. Ry.*, supra, *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, and *Carter v. Atlanta & St. A. B. Ry. Co.*, supra. Indeed, the Court of Appeals, in suggesting a "but for" doctrine of causation, has created and imposed a new burden of proof upon the employee which is nowhere to be found in the statute or in the interpretation thereof as rendered by this Court during the entire 43 years of this statute's existence. It is violative of the spirit of the statute itself and of everything this Court has ever said upon that subject.

Old thoughts and approaches die slowly. It is uncomfortable for judges up and down the line to give up their hornbook routine and thinking, particularly in cases dealing with master-and-servant relationships in all its forms. Encrusted with die-hard ideas of defenses conceived in the days of laissez-faire economics that had studded the surface of the F. E. L. A. like the warts on a cucumber, the impact and the scope of the decision in the *Tiller* case, with all its implications, was mighty indeed. Naturally they yielded reluctantly to the intended elasticity of the remodeled statute from which the defense of assumption of risk had been deleted in all its guises. The phrase "in whole or in part" had received the broad extended coverage indicated in such cases as *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. A. 7, 1945), *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. A. 7, 1946) and *Coray v. So. Pac. Ry.*, 335 U. S. 520, 69 S. Ct. 275 (1949).

The narrow view on causation suggested by the Court of

Appeals in this case may be likened to the view of the Court of Appeals in *Penn v. Chi. & N. W. Ry. Co.*, 163 F. 2d 995 (C. A. 7, 1947), 335 U. S. 849, 69 S. Ct. 79 (1948), in which this Court granted certiorari and reversed at one and the same time, in two lines. The decision of the Court below on proximate cause is absolutely inconsistent with the decision in *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, 952 (C. A. 8, 1950), where this Court said, as to causal relationship:

> "The Court in such a case has equally no right to direct a verdict on legalistic refinements between remote and immediate causation. * * * The choice between conflicting theories of causation, each of which is a rational possibility on some probative fact or facts, is one which the jury alone is entitled to make."

In the *Penn* case, this Court granted certiorari, reversed and cited the controlling case, all at one and the same time. This expeditious and unequivocal way of reversing and reestablishing the appropriate legal doctrine would, we respectfully suggest, be highly appropriate in the case at bar. In that manner, the knife that repeatedly seeks to carve out of this statute new exceptions whereby protection of railroad employees is effectually destroyed, will be dulled.

Since the decision of the Court below was based solely upon an *error of law*, this is an appropriate case for certiorari, even within the restricted view of *Carter v. Atlanta & St. A. B. Ry. Co.*, supra.

III. The question of causal relation between the negligence and the fatal injury was one of fact exclusively for the jury.

In the case at bar, the jury found a verdict for the plaintiff, based upon negligence. The Court of Appeals conceded that the jury had found that the engineer did not sound his whistle as he reached the station, in violation of rule 14 (p). The Court, returning to the outmoded concepts of the *Chamberlain* case, declared that plaintiff must prove that but for this admitted negligence, Healy would not have been run down. The Court stated:

> "There is nothing to *demonstrate* a causal connection between the failure of the engineer to sound the whistle and the happening of the accident, or that that failure contributed 'in whole or in part' to Healy's death." (Emphasis ours.)

The Court cites, in support of this extraordinary position, its own opinion in *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327 (C. A. 3, 1942), as well as *Tiller v. Atlantic Coast Line, R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943), 323 U. S. 574, 65 S. Ct. 421 (1945); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Lilly v. Grand Trunk R. Co.*, 317 U. S. 481, 63 S. Ct. 347 (1943); *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (1943); and *Blair v. B. & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945). But in all of those cases, the question of causal connection between the negligence and the ensuing injury were properly left to the jury. Even under common law principles in strict Pennsylvania, on proof that a business invitee to premises falls on a stairway over which burnt-out light bulbs have negligently been permitted to remain, no such narrow

TO BE READ AFTER FOURTH LINE FROM TOP OF PAGE 17.

It is interesting to note that in the Third Circuit, from which the instant case emanates, in a simple tort matter, where the liberal interpretation mandatory in F. E. L. A. cases is lacking, Judge Goodrich, speaking on causation, had this to say, in *Diesbourg v. Hazel-Atlas Glass Co.*, 176 F. 2d 410 (1949), at 413:

> "This question of proximate cause is as difficult a one for triers of fact as it is for law students. Events which cause people harm in the day to day world are not observed under the controlled conditions of a carefully organized testing laboratory. The best we can ever hope to get is approximate accuracy. That is true of the conduct of ordinary affairs of life by all of us and it should be good enough for a law suit."

That test, applied to the instant case, would have rendered impossible the decision of the Court of Appeals as grounded. The decision of a case should not depend on which three of the seven judges in a Circuit happen to be sitting. Else the result can be unequal justice.

The facts of the Moore case, referred to previously, were weaker than the facts in the instant case. Similar legal questions are, however, involved. It must be pointed out that the *Moore* case notwithstanding, *Healy* does present a question of fact exclusively for the jury.

All of these cases illustrate the problems of evidence engendered by restrictive interpretation of Rules 33 and 34 in *Alltmont, et al. v. U. S., et al.*, 177 F. 2d 971 (C. A. 3, 1949), cert. den. 339 U. S. 967, 70 S. Ct. 999 (1950). Under the necessity of showing undefined "good cause" as required in that case, vital evidence may successfully be suppressed. The effects of the *Alltmont* decision should be compared

with the cases arising under Federal Rules of Civil Procedure 26, 30, 31, 33 and 34 in the District Court for the Eastern District of Pennsylvania. In *De Bruce v. Pennsylvania R. Co.*, D. C. E. D. Pa., Civil Action No. 5477 (1947), 6 F. R. D. 403 (1947), and *Hickman v. Taylor*, 329 U. S. 495, 67 S. Ct. 385 (1947), the rules served truly as an emetic. All of the facts were made available and therefore a decision consonant with law and justice followed.[11]

The safeguard for all litigants faced with the restrictions of the discovery rules and the unavailability of proof in the exclusive custody of the defendant, lies in the broad adaptability of the jury system. In the case at bar, plaintiff proved a violation of safety rule 14 (p). The jury found, as a fact, that the failure to sound the whistle contributed in whole or in part to the death of Healy. To take this immemorial fact-finding function from the jury and to establish unattainable standards of proof before an issue may be submitted to the jury, as the Court of Appeals has done, represents a radical and retrograde departure from the established interpretation of the Federal Employers' Liability Act.

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[11] The importance of the rules of evidence may not be minimized. It should be noted that the Committee on Procedural Rules is not composed of members who are obliged to deal with the difficult problems of obtaining evidence. The Committee has no member who is a plaintiff's counsel. Therefore the importance of discovery, particularly in death actions, may not be realized. It is not reflected in the rules.

Under the discovery rules recently adopted in New Jersey, under the heading "Use of Depositions", 3:26-4, we find:

> "At the trial * * * any part or all of a deposition * * * may be used in accordance with any one of the following provisions:
>
> "* * * The deposition of a witness whether or not a party may be used by any party **for any purpose** against any other party who was present or represented on the taking of the deposition, or who had due notice thereof, provided the court finds * * *"
>
> "* * * Upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of the witness orally in open court, to allow the deposition to be used." (Emphasis ours.)

CONCLUSION.

It must be assumed that Congress is aware of this Court's opinions in *Wilkerson v. McCarthy*, supra, *Tiller v. Atlantic Coast Line R. Co.*, supra, *Lavender v. Kurn*, supra, etc., and that its refusal to enact other legislation dealing with railroad employees indicates that these opinions correctly interpret the legislative intent. To permit the decision in the case at bar to stand without review would upset the well-established law and invite continuous re-litigation. Therefore, we respectfully urge that this is precisely the type of case which, in the interests of economy of time and administration of justice, is entitled to review under Rule 38.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

B. NATHANIEL RICHTER, of counsel for Petitioner, certifies that the Petition for Rehearing in the within matter is presented by him on behalf of Petitioner in good faith and not for any purpose of delay. Deponent also certifies that the Petitioner is restricted to the grounds specified in Supreme Court Rule 33, and as set forth in the Petition for Rehearing.

/s/ B. NATHANIEL RICHTER.